

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matter of) MM Docket No. 01-317
)
Rules and Policies Concerning)
Multiple Ownership of Radio Broadcast)
Stations in Local Markets)
)
Definition of Radio Markets) MM Docket No. 00-244

TO THE COMMISSION

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**COMMENTS OF THE MINORITY MEDIA
AND TELECOMMUNICATIONS COUNCIL**

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DEDICATION: EARLE K. MOORE

Last fall we lost a civil rights giant. Most current and former FCC officials and staff will recognize the name Earle K. (Dick) Moore. Yet Dick Moore gave those of us in the freedom struggle the greatest possible gift -- four years of intensive litigation before the FCC that defined to this day what diversity means and what public trusteeship of the airwaves is all about.

Since 1954, the Office of Communication of the United Church of Christ had fought without success to integrate the television industry in the south. WLBT-TV, Channel 3 in Jackson, Mississippi, was fairly typical: licensed to a large insurance company, affiliated (at the time) with the NBC network; signed off with a prayer delivered by a different local pastor every evening. The station was typical in other ways: White Citizens Council literature on sale in the station lobby; African Americans employed only as janitors, and covered on the news only as crime perpetrators; network coverage of civil rights blocked out by the local "news" department. When African American citizens complained to the FCC, it ruled in 1965 that mere viewers did not have a sufficient interest in the station's programming to have standing to complain.

Thanks to Dick Moore, citizen standing before the FCC was born with the landmark case Office of Communication of the United Church of Christ v. FCC, 359 F.2d 994 (D.C. Cir. 1966) ("UCC I"). And in another case of the same name in 1969, the court ordered the Commission to vacate WLBT's license renewal entirely, since a

discriminator is unqualified to hold a federal license. Office of Communication of the United Church of Christ v. FCC, 425 F.2d 543 (D.C. Cir. 1969) ("UCC II").

In the 1970's, Dick brought cases that advanced the rights of children to receive television programming that doesn't exploit children. Still active in civil rights, he imported into communications law the concept of a "private attorney general" who brings cases on behalf of the public. MMTC is here today because of that monumental body of work.

We hope Dick would have enjoyed these rulemaking comments, which propose the creation of a new class of radio stations devoted to providing new voices with an opportunity to be heard. If the Commission authorizes some of these "Free Speech" radio stations, the new entrepreneurs ought to sign on the air by thanking Dick Moore and encouraging those tuned in to also tune in to the values Dick's life exemplified.

* * * * *

SUMMARY

MMTC here unveils the "Free Speech Radio Concept," under which viewpoint diversity, source diversity, economic efficiency, variety, competition and minority ownership can all be advanced simultaneously. The Commission would create a new class of "Free Speech Stations" having at least 20 non-nighttime hours per week of airtime, independently owned by a small disadvantaged businesses, and primarily devoted to nonentertainment programming. A Free Speech Station would share time on the same channel with a largely deregulated "Entertainment Station." A platform owner that bifurcates a channel to accommodate a Free Speech Station and an Entertainment Station could then buy another fulltime station under the provision of the Communications Act that allows for an exception to the eight station rule when a new station is created. That additional fulltime station would also be bifurcated into a Free Speech and an Entertainment Station. In this way, a platform could grow steadily up to the limits allowed by competition analysis. Moreover, the number of voices and viewpoints heard by the public would grow exponentially, and minority ownership would get a much-needed boost. No new legislation would be required to accomplish all of this.

MMTC developed this idea as an answer to the diminishing diversity of viewpoints and owners in radio. In a comprehensive study on minority ownership commissioned by MMTC and filed with our Comments, Kofi Ofori found that while the number of minority controlled stations has increased slightly since 1996, structural consolidation has brought about a sharp decline in the number of

minority owners. Thus, consolidation threatens the intellectual diversity of the ownership pool and discourages new entrants. See Kofi Ofori, "Radio Local Market Consolidation and Minority Ownership" (MMTC, March, 2002).

The Ofori study also found that minority owned stations often cannot realize their full potential in the marketplace. They are impeded by advertiser discrimination and by inferior technical facilities that are a vestige of the days when the FCC ratified and validated the discrimination of its licensees -- a troubling history we document at considerable length in our Comments.

We also provide a comprehensive study entitled "The Relationships Between Platform Size and Program Formats in Commercial Radio" (MMTC, March, 2002). Our study found that large platforms have contributed to the variety of rock-based popular music formats heard on the radio. However, it is the standalone stations that have sustained such major format types as Spanish language and religious programming, and such niche formats as bluegrass, the blues, Chinese programming and radio for children. Often, stations adopt these specialized formats to protect themselves from platform owners, who seldom duplicate this programming and cannot sell around it.

We recommend that the Commission strive for a harmonious balance between platforms and standalones. A balance of ownership structures, each with its own strengths, would promote economic efficiency and viewpoint diversity while also protecting minority ownership. Platforms should be allowed to grow in a way that

promotes viewpoint diversity, as in the Free Speech Radio concept, while not becoming so large that they take all the nitrogen (spectrum) and oxygen (advertising dollars) in the market, leaving nothing for smaller companies.

Large, small, majority and minority owned broadcasters, advertisers, people working in radio, and the listening public can achieve their respective regulatory objectives if they would trust and work with one another. In that spirit, MMTC proposes that the Commission convene a negotiated rulemaking, through which the best minds in the communications policy world could develop the strongest possible consensus proposals for the agency's consideration.

* * * * *

The Minority Media and Telecommunications Council ("MMTC") respectfully submits its Comments in response to Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets (NPRM and Further NPRM), 16 FCC Rcd 19857 (2001) ("NPRM").^{1/}

MMTC's Interest In This Proceeding

Founded in 1986 and incorporated in 1994, MMTC is the principal advocate for minority participation in the electronic mass media and telecom industries. MMTC represents 42 organizations, including most of the national civil rights organizations, before the FCC and the federal courts. We also provide business planning assistance to entrepreneurs seeking to enter the media and telecom industries, and thus we frequently interact with those most directly affected by the policies under review in this proceeding.

Furthermore, since 1997 MMTC has operated the nation's only minority owned and only nonprofit full service media and telecom brokerage. MMTC has participated as a broker or marketer in transactions valued at in excess of \$1.7 billion. In 2001, MMTC was inducted into the National Association of Media Brokers.

Between 1997-2001, MMTC conducted over two dozen job fairs in cities across the country, enabling approximately 8,000 people to present their qualifications for employment in the radio industry.

Engaging in this work has provided MMTC with a sense of the potential of radio service, and the possibilities and realistic

^{1/} The views expressed in these Comments are the institutional views of MMTC, and do not necessarily reflect the individual views of each of its officers, directors or members.

boundaries of radio regulation. These Comments are offered in recognition that our radio industry is the best in the world -- and it can be made better still.

**I. The Importance Of Minority
Ownership In This Proceeding**

The Commission recognizes that it "has a statutory obligation under Section 309(j) of the Act as well as an historic commitment to encouraging minority participation in the telecommunications industry."^{2/} On March 8, 2002, the Commission expressly invited commenters in this proceeding to address minority ownership.^{3/}

Congress expects the Commission to make the radiofrequency spectrum -- a public resource -- available to all viewers and listeners without discrimination.^{4/} Yet that objective is

^{2/} 1998 Biennial Regulatory Review -- Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996 (NOI), 13 FCC Rcd 11276, 11283 ¶22 (1998) ("1998 NOI") (seeking comment "on the relationship between these ownership limits and the opportunity for minority broadcast station ownership" (fn. omitted); id. at 11299 (Separate Statement of Commissioner Susan Ness, asking, inter alia, about the impact of the ownership rules "on the number of minority and female-owned outlets"); id. at 11304 (Separate Statement of Commissioner Michael Powell, asking, inter alia, whether diversity of ownership encompasses "[a]dequate representation among others of minorities and women" and whether diversity of programming encompasses "[p]rogramming that is targeted to particular minority or gender groups within a community"); id. at 11306 (Separate Statement of Commissioner Gloria Tristani, soliciting comment on whether "all segments of society [including] rich and poor, urban and rural, minority and non-minority...have legal and practical access to such diversity and are actually making use of it.")

^{3/} Letter to David E. Honig from Roy J. Stewart, Chief, Mass Media, Bureau, March 8, 2002 (the NPRM "raises broad questions that we believe will allow for a comprehensive examination of our local radio ownership rules, including the more specific aspect of minority ownership.") This letter can be found as Appendix 3 to these Comments.

^{4/} 47 U.S.C. §151 (1996).

threatened by consolidation, for if there is no spectrum left to share, no remediation of past discrimination is possible. As a handful of companies occupy more and more of the radio broadcast spectrum, less and less is available as habitat for minority broadcast owners. History may come to regard the clear-cutting of this spectrum habitat as the first step in the starvation and ultimate extinction of minority ownership. All Americans will be the poorer if the intellectual diversity represented by minority owners is exterminated from the ranks of broadcast licensees.^{5/} Just as the continued success of minority financial institutions is fundamental to our banking system,^{6/} the continued growth of minority broadcast ownership is fundamental to radio regulation.

5/ See Christine Bachen, Allen Hammond, Laurie Mason and Stephanie Craft, "Diversity Of Programming In The Broadcast Spectrum: Is There A Link Between Owner Race Or Ethnicity And News And Public Affairs Programming?" Santa Clara University School of Law (2000) ("Diversity of Programming"). This study found that minority owned radio stations aired more racially diverse programming than did majority owned stations. Minority owned radio stations were significantly more likely than majority owned stations to broadcast programming about women's issues and live coverage of government meetings. They were also more likely to have a minority format for their music programming. Minority owned television stations were significantly more likely than their majority owned counterparts to broadcast current events-related programming and issues relevant to senior citizens.

6/ See Policy Statement Regarding Minority-Owned Depository Institutions, Federal Deposit Insurance Corporation (FDIC), 67 F.R. 77-80 (released January 2, 2002), which calls for comments on how the FDIC can implement provisions of the Section 308 of the Financial Institutions Reform, Recovery and Enforcement Act of 1989 that require the Secretary of the Treasury to consult with the Director of the Office of Thrift Supervision and the Chairperson of the Board of Directors of the FDIC to determine the best methods for preserving and encouraging minority ownership of depository institutions. FDIC noted that it "has long recognized the unique role and importance of minority-owned depository institutions and has historically taken steps to preserve and encourage minority ownership of financial institutions." Id. at 77.

As a result of discrimination, minorities were late in getting a foothold in radio ownership.^{7/} Even today, lack of access to capital continues to make it difficult for minorities to buy their

^{7/} It is often pointed out that only about 6% of the original owners of broadcast stations still own these stations. The point of this statistic is apparently that minorities were not disadvantaged by having to buy what others got for free. The premise of the argument is that a "little" discrimination (6% of a seventeen billion dollar industry) can be forgiven and forgotten. This infuriating, intellectually dishonest argument embeds at least four logical fallacies; we deal with them here in the margin so we won't have to dignify them later in these Comments. See pp. 72-103 infra, discussing in some detail how minorities were almost entirely kept out of broadcasting for its first seven decades.

First, obviously, 6% of a trillion dollars is not de minimis; but the nonminority headstart is actually much more than 6% of the asset value of the industry. The stations originally bought by Whites, who faced no minority competition for them, are among today's most valuable properties. Included among these stations are numerous big-market VHF network affiliates and all of the 25 full power unduplicated AM clear channel stations -- all prime beachfront property.

Second, the first owners of broadcast stations typically chose the second owners, who chose the third owners, and so on seriatim. Until MMTC founded its media brokerage in 1997, there were no minority owned brokerages, or even any minorities employed by nonminority brokers. The Commission expressly rejected a 1978 proposal by Commissioner Hooks to create a transparent bidding process for broadcast sales -- at a time when minorities owned only sixty stations. Public Notice of Intent to Sell Broadcast Station, 43 RR2d 1, 3 n. 3 (1978). Thus, when today's nonminority owners bought into radio a generation ago, their bids were insulated from minority competition, and nonminorities enjoyed an opportunity to purchase stations at prices that did not reflect the oligopoly rents buyers pay today.

Third, nonminorities' headstart in broadcast ownership affords them a huge competitive advantage in depth of experience, job tenure, and crossgenerational entitlements. Many young White college graduates entering broadcasting today can call for help from parents, uncles and aunts and grandparents who entered broadcasting early without facing competition from minorities. These fortunate few, with the advantage of family ties to the beneficiaries of discrimination, today stand first in line for internships, plum jobs, and investments in their startup broadcast companies.

(n. 7 continued on p. 5)

way into an industry others entered for free. Consequently, large vertically and horizontally integrated companies can usually outbid most minority owned companies for desirable properties. Most minority owned companies are quite small; consequently, pro-consolidation rulings tend to be anti-small business and they tend to inhibit minority ownership.^{8/} In the past, the Commission almost always rationalized serial increases in consolidation by pointing to the existence of incentive programs specifically

7/ (continued from p. 4)

Fourth, the money earned and put into family treasuries in the first 50 years of broadcasting has been converted into the working capital that supports today's generation of broadcast entrepreneurs. Some of that money went into other industries, just as money from other industries went into broadcasting. But the profits earned during the years when minorities were not permitted to own stations formed a mountain of capital controlled by families attuned to broadcast investing and ownership. Minorities trying to buy their way into the industry are starting from nothing.

Consequently, even if only 6% of the original owners still own the same stations, the legacy of segregation is that the original owners have created a stratified system of broadcasting that persists today, in which the racial privileges of the industry's founders continue to reproduce themselves intergenerationally with little resistance or even conscious recognition by the industry, its regulators or the public.

8/ MMTC has often called attention to this phenomenon. For example, after the Commission doubled the local ownership limits in 1992 in Revision of Radio Rules and Policies, 7 FCC Rcd 2755, 2758-61 ("1992 Radio Rules"), recon. denied, 7 FCC Rcd 6387 (1992) ("1992 Radio Rules - Reconsideration"), MMTC observed:

Minority broadcasters suffered dearly from the 1992 radio rules. Since most minority owned stations are AM standalones or Class A FMs, minorities seldom find themselves able to take advantage of LMAs and duopolies. Instead, they are faced with ever-larger and more economically powerful nonminority competitors.

Reply Comments of MMTC in Review of the Commission's Regulations Governing Television Broadcasting, MM Docket No. 91-221 (filed June 10, 1995).

designed to foster minority ownership.^{9/} But today these minority ownership policies are virtually dead,^{10/} and in 1996 the Commission unfortunately decoupled its broadcast structural and attribution review from efforts to promote minority ownership.^{11/} Unless the Commission begins systematically to focus attention on

^{9/} 1992 Radio Rules, 7 FCC Rcd at 2769-2770 ¶¶26-29.

^{10/} The history of the Commission's minority ownership policies is well known, so it is recited here only in summary form for the uninitiated. A court decision in 1973 that required the FCC to take racial diversity of ownership into account in comparative hearings. TV 9, Inc. v. FCC, 495 F.2d 929 (D.C. Cir. 1973), cert. denied, 418 U.S. 986 (1974) ("TV 9"). The FCC then began to study means of fostering minority broadcast ownership. In 1978, the FCC adopted two policies, distress sales and the tax certificate. Statement of Policy on Minority Ownership of Broadcast Facilities, 68 FCC2d 979, 983 (1978) ("1978 Minority Ownership Policy Statement"). These policies lifted minority broadcast ownership from 60 stations in 1978 to over 300 stations by 1995. But in that fateful year, Congress voted to repeal the tax certificate policy. Deduction for Health Insurance Costs of Self-Employed Individuals, Pub. L. No. 104-7, §2, 109 Stat. 93, 93-94 (1995) (codified at 26 U.S.C. §1071 (1995)). Then two months later, the Supreme Court made it much more difficult for any race-conscious federal program to withstand judicial review. Adarand Constructors, Inc. v. Peña, 515 U.S. 200 (1995) ("Adarand III"). On the heels of these losses, two D.C. Circuit decisions invalidated the 1971 and the 2000 FCC broadcast and cable equal employment opportunity regulations. Lutheran Church-Missouri Synod v. FCC, 141 F.3d 344, petition for rehearing denied, 154 F.3d 487, suggestions for rehearing en banc denied, 154 F.3d 494 (D.C. Cir. 1998) ("Lutheran Church") (striking down original 1971 version of the Commission's broadcast and cable EEO regulations); MD/DC/DE Broadcasters Ass'n. v. FCC, 236 F.3d 13, rehearing and rehearing en banc denied, 253 F.3d 732 (D.C. Cir. 2001), cert. denied sub nom. MMTC v. FCC, D.C. Cir. No. 01-639 (January 22, 2002) ("MD/DC/DE Broadcasters") (striking down the dilute 2000 EEO regulations). These developments have left advocates for small and minority business, and for diversity and inclusion, searching for new ways to steer the FCC back onto a civil rights heading.

^{11/} In 1995, the Commission recognized that multiple ownership, attribution and minority ownership are closely interrelated. Thus, it called for concurrently filed and crossreferenced comments in proceedings addressing each of these issues. See Review of the Commission's Regulations Governing Television Broadcasting (Further

minority ownership, it seems unlikely that new minority ownership policies would take effect before a new wave of consolidation is spawned by a resumption of deal flow as the recession abates or by further deregulation that might result from this proceeding.^{12/}

^{11/} (continued from p. 6)

NPRM, 10 FCC Rcd 3524 (1995); Review of the Commission's Regulations Governing Attribution of Broadcast Interests (NPRM), 10 FCC Rcd 3606 (1995); Policies and Rules Regarding Minority and Female Ownership of Mass Media Facilities (NPRM), 10 FCC Rcd 2788 (1995). However, after Adarand III, the Commission decoupled the minority ownership proceeding. Review of the Commission's Regulations Governing Television Broadcasting (Second Further NPRM), 11 FCC Rcd 21655 (1996); Review of the Commission's Regulations Governing Attribution of Broadcast and Cable/MDS Interests (Further NPRM), 11 FCC Rcd 19895 (1996); Broadcast Television National Ownership Rules (NPRM), 11 FCC Rcd 19949 (1996) (subsequent histories omitted). Nothing has happened in the minority ownership docket since then.

^{12/} By December, 2000, the Commission had released six research studies on minority ownership that it conducted pursuant to Section 257 of the Communications Act. The following month the Commission declined to consider MMTC's minority ownership proposals in the TV local ownership proceeding because the Commission had not yet evaluated the December, 2000 studies. Review of the Commission's Regulations Governing Television Broadcasting (MO&O and Second Order on Reconsideration), 16 FCC Rcd 1067, 1078 ¶33 and 1078-79 n. 69 (2001) (previous and subsequent histories omitted). Over a year as passed, but no analysis of these studies, no further studies, no rulemaking proposals and no legislative proposals have emerged. Evaluation of the research studies may have been delayed in light of the pendency of Adarand Constructors, Inc. v. Mineta, No. 00-730 (2000 Term) ("Adarand VIII"), which raised the issue of whether, as a practical matter, a federal contracting program could ever be even modestly race-conscious. The Solicitor General defended the Department of Transportation's moderately race conscious program, as did amici MMTC and seventeen organizations joining in MMTC's brief. On November 27, 2001, the Supreme Court decided Adarand VIII, issuing a per curiam opinion holding that certiorari had been improvidently granted. Thus, for the first time, a federal race conscious business contracting program has survived judicial review under strict scrutiny. Adarand Constructors, Inc. v. Slater, 228 F.3d 1147 (10th Cir. 2000), certiorari dismissed as improvidently granted sub nom. Adarand Constructors, Inc. v. Mineta, No. 00-730 (2002) (per curiam). The socially and economically disadvantaged business model presented by the DOT's program is the model MMTC has advocated as the basis for FCC programs to foster minority ownership.

The absence of minority ownership programs is a fundamentally changed circumstance of which the Commission must take account.^{13/} This circumstance was what Congress had in mind when it enacted Section 257 of the Communications Act, which obliges the Commission to take steps to close market entry barriers facing small entrepreneurs.^{14/}

No entry barrier has greater market-distorting power than discrimination and its present effects, and no Commission proceeding bears more closely on the presence of this entry barrier than this proceeding. While not itself explicitly discriminatory, consolidation can magnify the influence of past discrimination on radio ownership. Thus, the Commission should take close account of the impact of its proposals on small and minority business opportunity.

Any increase in the number of stations a company can own must be considered with the utmost caution. A mistake is not correctable. After it has raised an ownership cap, the Commission can hardly declare that it made a mistake, and then try to restore the previous cap. Divestitures required by a reduction in ownership caps would be criticized as akin to a taking of property.

^{13/} See Geller v. FCC, 610 F.2d 973, 980 (D.C. Cir. 1979) (noting that "[e]ven a statute dependent for its validity on a premise extant at the time of enactment may become invalid if suddenly that predicate disappears," citing Chastleton Corp. v. Sinclair, 264 U.S. 543, 547-48 (1924)).

^{14/} See discussion at pp. 71-75 infra.

^{15/} Corporation of Kingston-upon-Hull v. Horner (Lord Mansfield, 1774).

Although a broadcast license is not property, "possession is rather more than nine points of the law."^{15/}

Considerable creativity must be devoted to fashioning regulatory paradigms in which the goals of consolidation -- economic efficiency and format variety -- go hand in hand with the goals of viewpoint diversity, niche format availability and minority ownership. As described at pp. 111-173 infra, incentives to share time and create two independently owned radio stations on the same channel would allow the Commission to authorize a modest degree of further consolidation in a manner specifically designed to promote minority ownership and viewpoint diversity.

Some of the issues in this proceeding, including the basic one of whether the Commission can change the eight-station cap, are largely theoretical exercises.^{16/} Nonetheless, MMTC appreciates the generally commendable job the Commission has done in the NPRM in identifying many of the key issues relating to structural ownership analysis. In the pages that follow, MMTC attempts to respond to many of the issues in the NPRM, focusing particularly on how their outcome will impact minority ownership.

^{16/} The NPRM asks whether the complex language of Section 202(b)(1) and 202(h) of the 1996 Act permits modification or repeal of the local ownership limits. NPRM at 19871-73 ¶¶23-27. The answer might not matter very much in the long run. Irrespective of whether the Commission can change the ownership limits on its own or must ask Congress to do so, the end result is that the limits could wind up being changed one way or another based on the facts elicited in this proceeding.

II. The Impact Of Consolidation On Competition And Diversity

MMTC describes in this section the likely impact that consolidation has had on competition and diversity.

In most rulemaking proceedings addressing industry structure, the Commission recounts dramatic changes in circumstances -- more voices, more competition, more convergence -- as reasons for deregulation. But here, the Commission has described an industry with fewer voices, less competition and only slight convergence with other industries. Thus, commenters cannot advance the traditional argument that "there are more voices, so the Commission must deregulate." Nonetheless, some commenters inevitably advance the inconsistent argument that "there are fewer voices, so the Commission must deregulate." The premise is that radio has already become so concentrated that the Commission might as well throw up its hands and abandon all efforts to promote diversity and competition. The Commission, however, should reject these appeals to give up on radio.

The most significant changes in radio in the past six years is that fewer companies own more stations, forcing other companies out of business entirely. This underscores why change is not always an argument for less regulation. As the Supreme Court has observed,

The forces of change do not always or necessarily point in the direction of deregulation....there is no more reason to presume that changing circumstances require the rescission of prior action, instead of a revision in or even the extension of current regulation. 17/

17/ Motor Vehicle Mfrs. Ass'n. of U.S., Inc. v. State Farm Mut. Auto Ins. Co., 463 U.S. 29, 41-42 (1983).

We begin, then, by asking whether the core value of diversity can be preserved. The NPRM identifies three aspects of diversity: (1) viewpoint diversity, which "ensures that the public has access to 'a wide range of diverse and antagonistic opinions and interpretations,'"18/ (2) outlet diversity, which "ensures that the public has access to multiple distribution channels (e.g., radio, broadcast television, and newspapers) from which it can access information and programming,"19/ and (3) source diversity, which "ensures that the public has access to information and programming from multiple content providers."20/

The NPRM also asks whether there are "other aspects of diversity that we should consider."21/ There are at least two. One of them is racial diversity, which we define as ensuring that members of the entire population, including minority groups, enjoy opportunities to own and control channels of mass communication. The other is format diversity or variety, which we define as ensuring that the public may receive content embedded and transmitted within multiple cultural and language environments.

One of the forms of diversity the Commission recognizes, outlet diversity, is largely unaffected by this proceeding, which is not aimed at expanding the width of the spectrum available for radio. Our views regarding source diversity are largely congruent

18/ NPRM at 19874 ¶30, citing 1998 NOI, 13 FCC Rcd at 11278 ¶.

19/ NPRM at 19874 ¶30, citing 1998 NOI, 13 FCC Rcd at 11278 ¶6.

20/ NPRM at 19874 ¶30, citing 1998 NOI, 13 FCC Rcd at 11278 ¶6.

21/ NPRM at 19874 ¶30.

with our perspective on viewpoint diversity. Thus, in these Comments, we focus primarily on viewpoint, format, and racial diversity.^{22/}

A. Viewpoint Diversity Is Threatened By Many Factors

Viewpoint diversity should be the paramount objective of radio regulation. As recently explained in The New York Times,

[t]he rules that govern concentration in telecommunication are unlike antitrust laws. In the bottled water and sneaker markets, mergers are allowed unless antitrust authorities can prove that added concentration would do harm. If the authorities err, and permit excessive consolidation, about all that happens is that the price of bottled water rises and innovation slacks off in the design of sneakers. But in telecommunications, the threat that concentration might shut off sources of information is profound. ^{23/}

Viewpoint diversity is a public good in its own right, as Congress and the courts have repeatedly reaffirmed.^{24/} Viewpoint

^{22/} See pp. 12-33 infra (viewpoint diversity), pp. 33-45 (format diversity), and pp. 59-63 and 107-110 (racial diversity).

^{23/} "The FCC's Ownership Rules," The New York Times, June 2, 2000, P. A-24.

^{24/} See, e.g., 47 U.S.C. §257 (1996) (noting that one of the "policies and purposes" of the Communications Act favors a "diversity of media voices"); Metro Broadcasting, Inc. v. FCC, 497 U.S. 547, 567 (1990) ("Metro Broadcasting") ("[s]afeguarding the public's right to receive a diversity of views and information over the airwaves is therefore an integral component of the FCC's mission"); Turner Broadcasting System, Inc. v. FCC, 512 U.S. 622, 663 (1994) ("Turner I") ("it has long been a basic tenet of national communications policy that the widest dissemination of information from diverse and antagonistic sources is essential to the welfare of the public" (quoting Associated Press v. U.S., 326 U.S. 1, 20 (1945) ("Associated Press"))); Turner Broadcasting System, Inc. v. FCC, 520 U.S. 180, 194 (1997) ("Turner II") ("[f]ederal policy...has long favored preserving a multiplicity of broadcast outlets regardless of whether the conduct that threatens it is motivated by anticompetitive animus or rises to the level of an antitrust violation.")

diversity cannot be advanced simply by promoting competition;^{25/} among other things, economic competitors might regard themselves simply as entertainers and elect to provide no viewpoints at all. As shown below, that is largely what has happened to the radio industry since 1981.

1. **Thanks To Program Deregulation,
Viewpoint Diversity Suffers From
"The Silence Of The Licensees"**

As defined in the NPRM, viewpoint diversity "ensures that the public has access to 'a wide range off diverse and antagonistic opinions and interpretations.'"^{26/} The traditional measurement for

^{25/} When Congress adopted the local radio ownership rules it "promoted diversity separate and apart from competition" by entitling Section 202(b) "Local Radio Diversity." Review of the Commission's Regulations Governing Television Broadcasting (Report and Order), 14 FCC Rcd 12903, 12913 ¶20 (1999) ("Television Local Ownership Order"), recon. denied, 16 FCC Rcd 1063, further recon. denied, 16 FCC Rcd 1067 (2001) ("Television Ownership Second Recon. Order"), appeal pending sub nom. Sinclair Broadcasting Group v. FCC, D.C. Cir. No. 01-1079 (filed February 20, 2001).

^{26/} NPRM at 19874 ¶30, citing 1998 NOI, 13 FCC Rcd at 11278 ¶6. In perhaps the best articulation of the value of viewpoint diversity, the Commission said in 1970:

A proper objective is the maximum diversity of ownership that technology permits in each area. We are of the view that 60 different licensees are more desirable than 50, and even that 51 are more desirable than 50. In a rapidly changing social climate, communication of ideas is vital....It might be that the 51st licensee...would become the communication channel for a solution to a severe local social crisis. No one can say that the present licensees are broadcasting everything worthwhile that can be communicated.

Multiple Ownership of Standard, FM and Television Broadcast Stations (First Report and Order), 22 FCC2d 306, 311 (1970).

viewpoint diversity is the number of speakers, or licensees.^{27/} That measurement may not do justice to the definition of viewpoint diversity, because public access to "diverse and antagonistic" voices assumes that some of these speakers are actually saying something "diverse" or "antagonistic" -- if they are "speaking" at all. Since program deregulation took effect in 1981, that assumption has lost its validity. Too many licensees say nothing, leaving the public with no more access to diverse viewpoints than that generated by a dark station.

Unfortunately, this dilemma -- which we call "The Silence Of The Licensees" -- is not addressed by the NPRM's suggestion that measuring diversity by counting the number of licensees might be supplemented by considering such factors as audience demographics, competition, market share, audience share, or subscribership.^{28/} These factors do not measure what the Commission accurately refers to as access to divergent viewpoints.^{29/} Viewpoint diversity should be measured neither by what the listeners choose to hear nor by the listeners' demographics, market share and the like.

^{27/} See NPRM at 19874 ¶31 (noting that Section 202(b) of the 1996 Act "speaks in terms of numerical limits on station ownership.") The Commission has generally preferred to speak of its goal of providing "outlets for local expression addressing each community's needs and interests." See Modification of FM Broadcast Stations Rules to Increase the Availability of Commercial FM Broadcast Assignments (Report and Order), 94 FCC2d 152, 158 (1983) ("Modification of FM Rules"). Actually, once these outlets take to the air, the Commission does little more than keep its fingers crossed and hope that these outlets will actually provide any local expression.

^{28/} NPRM at 19874 ¶31.

^{29/} NPRM at 19874 ¶30, citing 1998 NOI, 13 FCC Rcd at 11278 ¶6.

Instead, viewpoint diversity should be measured by counting the number of independent viewpoints or voices from which the listeners can choose.

The definition of viewpoint diversity could be adjusted to measure the frequency with which viewpoints actually find an audience, but that would defeat the purpose of the "access" concept. For example, a listener might choose to tune only to stations broadcasting noncontroversial celebrity "news" 30 days out of a month, but on the 31st day she might channel surf and accidentally tune into a weak-signal station with a 0.01 audience share that is broadcasting a fascinating viewpoint she had never heard before. If she stays tuned, and even if she never tunes to that station again, she might find that her life was changed by this single, "infrequent" exposure to a viewpoints. That is the beauty of the access model, which aspires to develop the radio spectrum as a library full of thousands of viewpoints available to anyone choosing to browse (channel surf). This access model is far better than the "market share" model, which is akin to a supermarket checkout counter that displays only the most popular titles.

Unfortunately, today the radio industry is neither a library nor a supermarket checkout counter; it is more like a library full of empty shelves because someone stole most of the books. The signature fact describing today's deregulated radio industry is

that most radio listeners don't hear many "viewpoints" at all.^{30/}

The least well kept secret in radio is that the majority of radio stations don't articulate very many viewpoints -- even their own.^{31/} While everyone knows what viewpoints are being articulated by the Washington Post, the Washington Times, The Nation or the Weekly Standard or (sometimes, as in Washington, D.C.) by the owners of the major television stations, how many radio listeners know what viewpoint the owner of her favorite radio station has on any subject of local or national importance? What radio listener really knows what her station's viewpoint is on campaign finance reform, or dredging the Chesapeake Bay, or carting nuclear waste to Yucca Mountain, or widening the Wilson Bridge? Can anyone reading these Comments remember when she last heard a commercial radio station broadcast an editorial, much less an editorial reply?

To be sure, news or news/talk formats are growing in influence. Nonetheless, all of the stations in these formats are often held by just one or two owners in a market, and many of these

^{30/} Except between 88.1 and 91.9 MHz. But nothing in the NPRM suggests that the Commission might abandon its efforts to promote diversity in the AM band and in the heavily traveled 92.1 to 107.9 FM band, relying instead on the fact that most communities have one or two ill-funded noncommercial stations.

^{31/} The "one speaker/one viewpoint" assumption could also be questioned by imagining that a speaker could articulate more than one viewpoint. But that possibility would arise only in the extremely rare case of a licensee who deliberately elects to program her station on somewhat the model of a common carrier. The closest example may be the broadcaster who indiscriminately time brokers away all of her station's airtime. But such a licensee normally will adhere to a format that mandates that access be limited to only certain types of speakers. To be regarded as a multiple-viewpoint licensee, a broadcaster would have to turn down no one -- even those who espouse views the licensee finds distasteful. So utopian a broadcaster is extremely rare.

stations air mostly syndicated programming with little or no original programming addressing local community needs. The fact that a few stations may choose to offer these formats hardly excuses the dozens of other stations from their obligation to say something of value to the public within the environment created their primarily entertainment-based formats.^{32/}

For the failure of radio to offer access to viewpoints, we can thank a decision Commission made nearly a generation ago which with the benefit of hindsight, was a huge mistake. In 1981, decades of feeble and awkward regulation of radio were administered their last rites in Deregulation of Radio.^{33/} Therein, the Commission basically declared failure after years of unsuccessfully enforcing regulations that required broadcasters to ascertain local needs and air significant amounts of nonentertainment programming to serve

^{32/} This raises the perennial question of whether community needs can adequately be addressed through music. Realistically, the answer is no. On occasion, a song played on the radio will discuss a national issue (e.g., Stevie Wonder's 1980 "Happy Birthday", which helped bring about the King Holiday.) But most popular music cannot be expected to contribute to democratic discourse, much less address specifically local issues. The days when commercial radio featured Woody Guthrie, Pete Seeger or Gil Scott-Heron are over, and those days won't return anytime soon as long as the Commission continues to censor poets.

^{33/} Deregulation of Radio (Report and Order), 84 FCC2d 968 ("Deregulation of Radio"), recon. granted in part, 87 FCC2d 797 (1981) ("Deregulation of Radio - Reconsideration"), aff'd in pertinent part sub nom. Office of Communication of the United Church of Christ v. FCC, 707 F.2d 1413 (D.C. Cir. 1983).

those needs.^{34/} The entirely predictable result of Deregulation of Radio was that broadcasters canceled public affairs programs and substituted higher-profit music or celebrity-talk shows. Today, competing, original local radio news broadcasts are rare^{35/} -- a particularly unfortunate development in light of the

^{34/} To be sure, radio stations are obliged to place in their public files that public interest fig leaf, the quarterly issues-programs list. That obligation is not enforced. See, e.g., License Renewal Applications of Certain Commercial Radio Stations Serving Philadelphia, Pennsylvania, 8 FCC Rcd 6400, 6405 ¶¶30-31 (MMB 1993) (failure to prepare two issues/programs lists, attributable to renewal applicant, resulted only in an admonishment.) Furthermore, a station can satisfy its bedrock obligation to serve community needs without airing a single viewpoint on any subject. Airing a few PSAs at 3:00 Sunday morning can (and sometimes does) suffice.

^{35/} Columbia Journalism Review reports that in many cities most or all radio news comes from one owner. Many stations "outsource" their news reports to syndicated services that cannibalize newspaper stories without payment. Most profound of all, with the exception of a few all-news stations in some major markets, radio reporters are disappearing from the air. As of 1998, there were 10,000 commercial radio stations in the country, but only about fifteen were all-news outlets employing significant news staffs.

"Commercial Radio Now," Columbia Journalism Review, November/December, 2001, p. 123. On a music station, news generally takes the form of a minute an hour from a national service, which hardly represents either an independent or local voice. Katy Bachman, "Music Outlets Tune in More News Reports," MediaWeek, October 29, 2001. One national source, Metro Networks, is actually by far the largest supplier of radio news, serving 1,700 radio stations, with an average penetration of 23 stations per market. Andrew J. Schwartzman, "Viacom-CBS Merger: Media Competition and Consolidation in the New Millennium," 52 Federal Comms. L. J. 516 (2000). The decline in radio news has accelerated in recent years. In 1998, RTNDA found that radio stations with news aired an average of 56 minutes per weekday, but in 2000 that number had declined to 42 minutes per weekday. RTNDA 2000 News and Staffing Survey (2001). Moreover, most radio news directors (78%) fill other jobs at the stations, such as announcing (30%), programming (15%), public affairs (15%) and even General Manager (8%) or sales (7%). In 1999, 64% of radio news directors had other roles; in 2000, 78% had other roles. Id.

instantaneousness and inexpensiveness of radio newsgathering and the attendant versatility of radio in covering local stories.

The scope of radio deregulation is breathtaking. Broadcasters have been relieved of, inter alia, obligations to preserve unique formats,^{36/} to ascertain needs,^{37/} to program to meet those needs,^{38/} to restrict commercialization,^{39/} to broadcast modest amounts of nonentertainment programming,^{40/} to broadcast local programming,^{41/} to observe the Fairness Doctrine,^{42/} and to program most of the airtime on stations they own.^{43/}

It may be impossible to restore even such modest, content-neutral measures as ascertainment. Thus, radio licensees do not have, nor might they ever have enforceable obligations to air any programming in the public interest -- much less any programming that could be characterized as presenting the "diverse and antagonistic" viewpoints that the First Amendment is designed to foster.^{44/} It follows that the only remaining tool available to promote viewpoint diversity is structural regulation.

^{36/} FCC v. WNCN Listeners Guild, 450 U.S. 582 (1981).

^{37/} Deregulation of Radio, 84 FCC2d at 993-99.

^{38/} Id.

^{39/} Id. at 1008.

^{40/} Id. at 977.

^{41/} Id. at 993-99.

^{42/} Fairness Report, 2 FCC Rcd 5272, 5295 (1987).

^{43/} 1992 Radio Rules, 7 FCC Rcd at 2787 ¶63.

^{44/} Associated Press, supra, 326 U.S. at 20.

2. Consolidation, Combined With Resource Scarcity, Has Diminished The Number of Voices Potentially Capable Of Providing Viewpoint Diversity

The consolidation brought about by the 1996 Act has been monumental,^{45/} and it is not finished. Today most of the largest companies have yet to bump up against the ownership limits in many of their markets. That was not the case in 1992, when many licensees were at or near their limits of an AM-FM in major markets (and at 12 AMs and 12 FMs nationally),^{46/} and it was not the case in 1996 when many licensees were at or near their limits of AM-AM-FM-FM combination in major markets.^{47/} Thus, irrespective of what the Commission does in this proceeding, more consolidation that is already allowed under the 1996 Act will occur.^{48/}

A photograph of the state of consolidation is provided in Kofi Ofori, "Radio Local Market Consolidation and Minority Ownership"

^{45/} William F. Baker, President of Thirteen/WNET New York, has put this quite bluntly: since 1996 there have been "more than 10,000 radio station transactions worth more than \$100 billion, and there are now at least 1,100 fewer station owners than before - a decline of nearly 30 percent in six years. The result is that in almost half the largest markets, the three largest companies control 80 percent of the radio audience." William F. Baker, "Masters of the Media," Washington Post, March 12, 2002, P. A-21.

^{46/} See 1992 Radio Rules, supra (changing local limits from AM-FM to as much as an AM-AM-FM-FM depending on market size).

^{47/} See Telecommunications Act of 1996, Pub. L. No. 104-104, §202(b)(1), 110 Stat. 56 (codified at 47 C.F.R. §73.3555(A)(1) (1996)) (repealing national radio ownership cap, and changing local limits to as much as 5 FM/3 AM depending on market size).

^{48/} See Inside Radio, February 22, 2002, p. 1 (in "the next phase of consolidation...smaller groups will have to merge to survive. Entercom, Cox, Emmis, Radio One, Beasley, Cumulus will not all be buyers. If business gets better, stock prices go up, deals start to get done..." and while Viacom and Citadel are likely likely to survive, "[o]ther radio groups [will] disappear."